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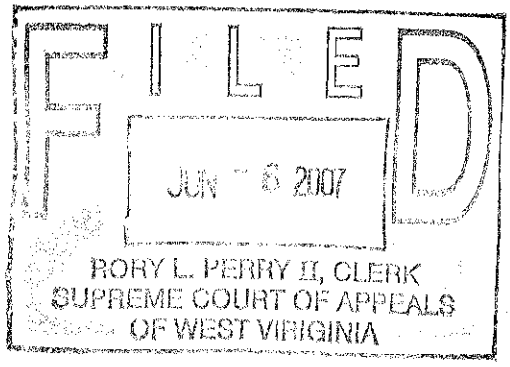
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA



JEFFERSON COUNTY
BOARD OF ZONING APPEALS,

Petitioner,

v.

Supreme Court Docket No.: _____
(Jefferson County Circuit Court Case Number 06-C-195)

HONORABLE CHRISTOPHER C. WILKES,
JUDGE OF THE TWENTY-THIRD JUDICIAL CIRCUIT,
HIGHLAND FARM, LLC, AND THORN HILL, LLC,

Respondents.

FROM THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

JEFFERSON COUNTY BOARD OF ZONING APPEALS' PETITION FOR WRIT OF PROHIBITION

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PETITION FOR WRIT OF PROHIBITION

Comes now the Jefferson County Board of Zoning Appeals (hereinafter "BZA"), by and through counsel, Brandon C. H. Sims and Stephanie F. Grove, Assistant Prosecutors, and hereby files this petition for a writ of prohibition, pursuant to Rule 14 of the West Virginia Rules of Appellate Procedure, and Ogden Newspapers, Inc. v. Wilkes, 198 W.Va. 587, 482 S.E.2d 204 (1996). The BZA hereby requests that this Court exercise its original jurisdiction and issue a rule to show cause in prohibition against the respondent Honorable Judge Christopher C. Wilkes. The BZA further requests that this Court issue a Writ of Prohibition against the respondent Judge Wilkes thereby prohibiting him from entering an order which denies the BZA's motion to disqualify J. Michael Cassell, Esq. and the law firm of Campbell, Miller Zimmerman, P.C., from representing Thorn Hill[1], LLC, Highland Farms, LLC, or the principals thereof in Jefferson County Civil Action Number 06-C-195. In support of this petition for a writ of prohibition the BZA avers as follows:

[1] Petitioner notes that the name of Respondent "Thorn Hill" appears variously herein as one or two words; it is referred to by its counsel in pleadings and by Petitioner herein as "Thorn Hill" spelled as two words, however, in the transcript quoted herein it is referred to as a single-word, "Thornhill".

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THE KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This is a petition for a writ of prohibition in response to the ruling of the Honorable Christopher C. Wilkes, which ruling denied the BZA's "Motion to Disqualify" J. Michael Cassell and the law firm of Campbell, Miller, Zimmerman from representing Highland Farm, LLC, and Thorn Hill, LLC, in Jefferson County Civil Action 06-C-195.

STATEMENT OF FACTS

From February 1, 1985 through January 31, 2005, J. Michael Cassell was employed as an Assistant Prosecutor in Jefferson County who provided legal counsel and advice to the BZA. As an Assistant Prosecutor, Mr. Cassell provided legal counsel on conditional use permit application number Z03-05 submitted by a developer, Thorn Hill, LLC. On February 1, 2005, Mr. Cassell joined the firm Campbell, Miller, Zimmerman, the same firm that represented Thorn Hill in its efforts to secure conditional use permit Z03-05. At the time Mr. Cassell left the Prosecutor's Office, CUP application number Z03-05 was still pending before the BZA. The BZA's Motion to Disqualify Mr. Cassell and his firm is based upon Mr. Cassell's representation of the BZA during the pendency of application number Z03-05, then his representation of the Applicant, Thorn Hill, in Z03-05 after leaving the prosecutor's office.

At a hearing on the Motion to Disqualify, the BZA presented evidence regarding Mr. Cassell's violations of Rule 1.11 of the West Virginia Rules of the Professional Conduct, including the testimony of BZA vice chairperson Thomas Trumble, who explained the nature of the attorney-client relationship between Mr. Cassell and the BZA while Mr. Cassell was an Assistant Prosecutor. Further, the BZA's expert, Allan N. Karlin, former chairperson of the West Virginia Lawyer Disciplinary Board, explained that Mr. Cassell and his firm violated Rule 1.11[2] when Mr. Cassell left the Prosecutor's Office to join Campbell, Miller, Zimmerman, because he was not screened from the Thorn Hill CUP application Z03-05 that he had worked on while an

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[2] Rule 1.11(a) provides in pertinent part that, "[e]xcept as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless: (1) the disqualified lawyer is screened from participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule."

Assistant Prosecutor, nor did his firm provide written notice to the BZA so that it could ascertain compliance with the Rule.

In 2001, Thorn Hill, LLC filed application number Z01-04 (hereinafter "Thorn Hill I") for a Conditional Use Permit (hereinafter "CUP") with the Department of Planning, Zoning, and Engineering (hereinafter "DPZE"). Subsequently, the Thorn Hill I application was assessed a passing Land Evaluation and Site Assessment (hereinafter "LESA") score by the Zoning Administrator, which meant that the Thorn Hill I proposal was eligible to move forward in the Development Review System necessary before a CUP is issued. Subsequently, the adequacy of the support data that Thorn Hill submitted to DPZE for Thorn Hill I was appealed by members of the public to the Planning Commission, which body found the support data adequate. Members of the public then appealed the Planning Commission decision to the Board of Zoning Appeals, which body affirmed the Planning Commission's decision. Finally, an appeal of the BZA determination was filed in Jefferson County Circuit Court, Case Number 02-C-40, styled as MacElwee *et al.* v. Jefferson County Board of Zoning Appeals *et al.* (hereinafter "MacElwee"). Thorn Hill, LLC later intervened in MacElwee. Mr. Cassell represented the BZA in the various Thorn Hill I appeals that were filed challenging the BZA's decision to affirm the Planning Commission's determination, including representing the BZA in the writ of certiorari filed in MacElwee. On March 15, 2002, Mr. Cassell filed three pleadings in MacElwee on behalf of the BZA: (1) "Replication", (2) "Motion to Join Indispensable Parties" and (3) "Affirmative Defense". The Thorn Hill I CUP application was ultimately approved for 171 homes on 159.7 acres of land.

In addition to the Thorn Hill I CUP application appealed in the MacElwee case, Thorn Hill and Highland Farm filed an application for a second CUP, in DPZE application number

Z03-05 (hereinafter "Thorn Hill II"), which sought to place 595 single family lots on 552 acres in the Rural-Agricultural District of Jefferson County. The Thorn Hill II CUP application for 595 homes, and included the original 171 lots and 159.7 acres that were processed under the Thorn Hill I application challenged in MacElwee. As occurred with the Thorn Hill I application, members of the public also appealed the LESA score assessed to the Thorn Hill II application to the Board of Zoning Appeals. The BZA affirmed the Zoning Administrator's LESA score determination for Thorn Hill II with the exception of the score assessed to sewer availability. Despite that difference, the LESA scores for both Thorn Hill I and Thorn Hill II were considered to be passing by the BZA.

Mr. Cassell, as counsel for the BZA, was present at several BZA meetings in which that body addressed the appeal of the Zoning Administrator's Thorn Hill II LESA score, including on May 20, 2004, when Mr. James P. Campbell, a principal of Campbell, Miller, Zimmerman, presented on behalf of Thorn Hill a motion to dismiss the Thorn Hill II LESA appeal to the BZA. According to the minutes of the August 19, 2004 BZA meeting, Mr. Cassell was directed to make revisions to the Findings of Fact and Conclusions of Law he previously drafted for the BZA for the Thorn Hill II LESA appeal, and on October 6, 2004, the same were adopted as revised.

Mr. Cassell also wrote and received copies of letters on behalf of the BZA regarding the Thorn Hill II CUP. On May 18, 2004, Mr. Cassell, as counsel for the BZA, received a copy of a letter from David Hammer to Zoning Administrator Paul Raco, wherein Mr. Hammer indicated that he was writing the letter in compliance with Mr. Cassell's recommendation. James P. Campbell was copied on the letter as counsel for Thorn Hill and Highland Farm. On August 12, 2004, Mr. Campbell, as counsel for Thorn Hill and Highland Farm, sent a letter to the BZA

regarding the Thorn Hill II appeal pending before the BZA. Mr. Cassell, as counsel for the BZA, was copied on the letter.

On December 10, 2004, Mr. Cassell tendered his resignation, effective January 31, 2005 to the Jefferson County Prosecuting Attorney. Mr. Cassell continued to represent the BZA and participate in the Thorn Hill II CUP application Z03-05 after submitting his resignation to the Prosecuting Attorney. On December 17, 2004, seven days after submitting his letter of resignation but while still employed as an assistant prosecutor, Mr. Cassell, as counsel for the BZA, sent a letter to Paul Raco instructing Mr. Raco to act consistently with a request received in a December 16, 2004 letter from Mr. Campbell, as counsel for Thorn Hill. Forty-six days after directing Mr. Raco to act consistently with Mr. Campbell's request, on February 1, 2005, Mr. Cassell became a member of the firm of Campbell, Miller Zimmerman.

After Mr. Cassell became a member of the firm of Campbell, Miller, Zimmerman the firm touted Mr. Cassell's professional experience, including his representation of the BZA and Planning Commission. According to the website of Campbell, Miller, Zimmerman:

> Mr. Cassell was an Assistant Prosecuting Attorney in Jefferson County, West Virginia for twenty years. He was the legal advisor for the County during the development and enactment of the Jefferson County Zoning Ordinance, which is the only County Zoning Ordinance in effect in West Virginia. Mr. Cassell advised the County Commission of Jefferson County, the Board of Zoning Appeals and the Planning and Zoning Commission.

http://www. cmzlaw.com/Bio/ JCassell.asp. Further, the website states, "Mr. Cassell was responsible for providing **all legal advice to Jefferson County** in the area of land use, and planning and zoning." *Id.* (Emphasis added).

During Mr. Cassell's tenure as an Assistant Prosecutor, the law firm of Campbell, Miller, Zimmerman represented Thorn Hill in various land use proceedings both before the BZA and in

Jefferson County Circuit Court[3]. The firm has continued to represent Thorn Hill since Mr. Cassell joined. Less than three months after joining the firm, on April 20, 2005, Mr. Cassell appeared representing Thorn Hill in a deposition of Deborah Arends in other civil litigation, 04-C-191, Thorn Hill LLC *et al.* v. Richard Latterell *et al.* (hereinafter "Latterell"). Thus, less than ninety days after leaving the prosecutor's office Mr. Cassell had formed an attorney-client relationship with Thorn Hill.

Even worse, as a member of Campbell, Miller, Zimmerman, Mr. Cassell has represented Thorn Hill on the exact same Thorn Hill II CUP application Z03-05 that was filed during his tenure as an assistant prosecutor and regarding which he provided legal advice to the Board of Zoning Appeals. Since joining Campbell, Miller, Zimmerman, Mr. Cassell has drafted various letters to his former client, the BZA, on behalf of his new client, Thorn Hill, regarding both: (1) the Thorn Hill II LESA appeal in which Mr. Cassell formerly represented the BZA while he was an Assistant Prosecutor; and (2) the status of the entire Thorn Hill II CUP application, of which

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[3] The law firm of Campbell, Miller, Zimmerman has represented Thorn Hill in at least six separate civil actions filed in Jefferson County Circuit Court, including:

(1) MacElwee *et al.* v. Jefferson County Board of Zoning Appeals, 02-C-40, where Thorn Hill was an intervenor, and in which suit representation by the firm began with the filing of an "Emergency Motion for Enforcement of Judgment.";
(2) Thorn Hill LLC *et al.* v. Richard Latterell *et al.*, 04-C-191, which case is essentially a SLAPP suit against those individuals who appealed the support data in MacElwee;
(3) Thorn Hill, LLC and Sheridan, LLC v. Paul J. Raco and Jefferson County Planning and Zoning Commission, 04-C-433;
(4) Rissler *et al.* v. Jefferson County Board of Zoning Appeals, 05-C-316, where Thorn Hill filed a "Motion to Intervene", after concerned citizens sued to contest the Land Evaluation and Site Assessment (LESA) score assessed to Thorn Hill's sewer system;
(5) Thorn Hill, LLC v. Jefferson County Planning Commission, 05-C-372, a writ of mandamus action; and
(6) Highland Farm, LLC and Thorn Hill, LLC v. Jefferson County Board of Zoning Appeals, 06-C-195, the case appealed from below.

In addition, Campbell, Miller, Zimmerman has represented Thorn Hill in at least two other cases before other tribunals. One is before the United States District Court for the Northern District of West Virginia in Thornhill, Inc. v. NVR, Inc., Case No. 3:05CV36, a contract dispute which alleges that delays caused by proceedings before the BZA, the Circuit Court of Jefferson County and the Supreme Court of Appeals of West Virginia constitute a "delay" for over six months pursuant to the written lot purchase agreements thereby making the lot purchase agreements between Thorn Hill and NVR terminable. In the second case, the firm represented Thorn Hill before the West Virginia Public Service Commission in Susan Rissler Sheeley v. Jefferson County Public Service District; Old Standard, LLC; and Thorn Hill, LLC, Case No. 04-1026-PSD-C, which case challenged the Thorn Hill sewer system.

the LESA appeal is a part. On May 25, 2005, Mr. Cassell sent a FOIA request to Zoning Administrator and DPZE Department Head Paul Raco regarding the Thorn Hill II LESA appeal and Thorn Hill II CUP application. The request appears on Campbell, Miller, Zimmerman letterhead and the handwritten notations made by DPZE staff indicate that Mr. Cassell personally picked up the responsive documents on June 3, 2005. On October 11, 2005, Mr. Cassell again wrote to Mr. Raco and requested on behalf of Thorn Hill that Mr. Raco move the CUP application forward in the Development Review System process and schedule a Compatibility Assessment Meeting.

On several occasions thereafter, the Jefferson County Prosecutor attempted to raise the issue of both Mr. Cassell's and Campbell, Miller, Zimmerman's conflict with regard to Thorn Hill. On March 6, 2006, Jefferson County Prosecutor Michael D. Thompson, raised the issue of Mr. Cassell's apparent conflict in writing when he sent a letter to Campbell, Miller, Zimmerman, requesting that Mr. Cassell and his firm take proactive steps to correct the problem in regard to then-pending case 05-C-372. On March 9, 2006, the Circuit Court granted Thorn Hill's Petition for a Writ of Mandamus in 05-C-372, Thorn Hill LLC v. Jefferson County Planning Commission and Paul J. Raco. On March 21, 2006, James P. Campbell responded in writing to Mr. Thompson's March 6, 2006 letter denying any conflict of interest or violation of the Rules of Professional Conduct, and stating that screening Mr. Cassell was unnecessary because the Thorn Hill cases did not involve the same "matter". On March 28, 2006, Mr. Thompson replied in writing to Mr. Campbell and requested that the firm and Mr. Cassell comply with Rules 1.9 and 1.11 of the Rules of Professional Conduct. Additionally, Mr. Thompson and Mr. Campbell met[4] in an attempt to resolve the issue, which meeting was inconclusive.

[4] One of the undersigned counsel, Brandon C. H. Sims, was also a participant in that meeting. Mr. Cassell was not present and did not participate in the meeting.

A public hearing regarding the Thorn Hill II CUP application Z03-05 was scheduled before the BZA on May 18, 2006. Due to the apparent conflict presented by the Mr. Cassell's and Campbell, Miller, Zimmerman's representation of the Petitioner at that time, and Mr. Cassell's prior representation of the BZA in relation to Z03-05, the BZA continued the hearing in order to first determine whether it would be proper for that body to hear the matter. Before the BZA could petition the circuit court to make such a determination, Thorn Hill filed a Complaint for Declaratory Judgment, Injunction, and Petitioner for Writ of Mandamus, 06-C-195, from which case this petition is filed, on June 2, 2006. Subsequently, on July 17, 2006, the BZA filed its "Motion to Disqualify" Mr. Cassell and his firm with the Circuit Court. An evidentiary hearing was held on November 21, 2006 and testimony was taken from four witnesses, including expert witnesses for both parties. On January 16, 2007, the court entered an order denying the BZA's motion to disqualify, finding that the each phase of a CUP application was not a substantially related matter, and therefore, the Campbell, Miller, Zimmerman firm and Mr. Cassell did not violate the Rules of Professional conduct.

ASSIGNMENTS OF ERROR

A. **The Circuit Court Erred in Ruling that Mr. Cassell and Campbell, Miller, Zimmerman did not Need to Comply with Rule 1.11 on the Basis that the LESA Appeal and Compatibility Assessment are not Substantially Related Matters, when Each is a Component of the Conditional Use Permit Application Process.**

B. **The Circuit Court Erred in Failing to Consider the Rationale behind Rule 1.11 of the West Virginia Rules of Professional Conduct.**

C. **The Circuit Court Erred in Ruling that as a Public Body the Board of Zoning Appeals Does Not Have a Traditional Attorney-Client Privilege with its Counsel.**

D. **The Circuit Court Erred in Ruling that Mr. Cassell Did Not Violate Rule 1.11(c) in Negotiations for Employment on the Basis that the Two Matters are Not Substantially Related.**

POINTS AND AUTHORITIES RELIED UPON

Rules

West Virginia Rule of Professional Conduct 1.11

West Virginia Cases

Lawyer Disciplinary Board v. Artimez, 208 W.Va. 288, 540 S.E.2d 156 (2000)

Ogden Newspapers, Inc. v. Wilkes, 198 W.Va. 587, 589 482 S.E.2d 204, 206 (1996)

Peters v. County Commission of Wood County, 205 W.Va. 481, 519 S.E.2d 179 (1999)

State *ex rel.* Cosenza v. Hill, 216 W.Va. 482, 607 S.E.2d 811 (2004)

State *ex rel.* McClanahan v. Hamilton, 189 W.Va. 290, 430 S.E.2d 569 (1993)

Other Cases

Brown v. District of Columbia Board of Zoning Adjustment, 486 A.2d 37 (D.C. 1984)

Commonwealth v. Eastern Dawn Mobile Home Park, Inc. 486 Pa. 326, 405 A.2d 1232 (1979)

Iowa Supreme Court Attorney Disciplinary Board v. Howe, 706 N.W.2d 360 (2005)

Walker v. State Department of Transportation and Development, 817 So.2d 57 (2002)

Other Ordinances

Jefferson County Zoning and Land Development Ordinance § 7.6(f)

STANDARD OF REVIEW

In Ogden Newspapers, Inc. v. Wilkes, 198 W.Va. 587, 589 482 S.E.2d 204, 206 (1996), this court stated that, "[o]ur law is well settled that a party aggrieved by a trial court's decision on a motion to disqualify may properly challenge the trial court's decision by way of a petition for writ of prohibition." *Citing* State *ex rel.* McClanahan v. Hamilton, 189 W.Va. 290, 430 S.E.2d 569 (1993). The Ogden court noted that the reason that a writ of prohibition is available under original jurisdiction "to review a motion to disqualify a lawyer is manifest[5]." 198 W.Va. at 206, 430 S.E.2d at 589. The Ogden court held in Syllabus Point 1 that:

> In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among the litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

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[5] The Court explained that ". . . [i]f a party who is unsuccessful in its motion to disqualify is forced to wait until after the trial to appeal, and then is successful on appeal, not only is that party exposed to undue costs and delay, but by the end of the first trial, the confidential information the party sought to protect may be disclosed to the opposing party or made a part of the record. Even if the opposing party obtained new counsel, irreparable harm would have already been done to the former client. The harm that would be done to the client if it were not allowed to challenge the decision by the exercise of original jurisdiction in this Court through a writ of prohibition would effectively emasculate any other remedy." 198 W.Va. at 206-207, 430 S.E.2d at 589-590.

MEMORANDUM OF LAW

A. The Circuit Court Erred in Ruling that Mr. Cassell and Campbell, Miller, Zimmerman did not Need to Comply with Rule 1.11 on the Basis that the LESA Appeal and Compatibility Assessment are not Substantially Related Matters, when Each is a Component of the Conditional Use Permit Application Process.

The notion that the three phases of the Conditional Use Permit Application are separate matters violates the letter and spirit of Rule 1.11 of the West Virginia Rules of Professional Conduct. Nonetheless, the Circuit Court used this rationale to rule that Mr. Cassell and Campbell, Miller, Zimmerman did not violate Rule 1.11 of the West Virginia Rules of Professional Conduct.

The LESA score assigned to property development is the first of three steps in the Conditional Use Permit application under the Jefferson County Zoning and Land Development Ordinance (hereinafter "the Zoning Ordinance"), and compatibility is the third step. Section 7.6(f) of the Zoning Ordinance provides that "the standards governing the issuance of Conditional Use Permits shall be: [1] successful LESA point application; [2] Board of Zoning Appeal's resolution of unresolved issues; and, [3] evidence offered by testimony and findings by the Board of Zoning Appeals that the proposed development is compatible with the neighborhood where it is proposed."

Rule 1.11(a) of the West Virginia Rules of Professional Conduct provides that:

> [e]xcept as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless: (1) the disqualified lawyer is screened from participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the

> appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

Rule 1.11(d) further provides that, "[a]s used in this Rule, the term "matter" includes [ ] any . . . application . . . or other particular matter involving a specific party or parties." As noted by the comment to Rule 1.11, "[t]his Rule prevents a lawyer from exploiting public office for the advantage of a private client."

The Circuit Court ruled that LESA and compatibility are separate matters, and that accordingly, Mr. Cassell's representation of the BZA in regard to the Thorn Hill II LESA score and subsequent representation of Thorn Hill before the BZA on the issue of compatibility for Thorn Hill II does not violate Rule 1.11. This ruling is erroneous because LESA and compatibility are two steps of the three-step CUP process. The contention of Thorn Hill and its counsel, which was adopted by the Circuit Court, that a single CUP application, Z03-05, should be considered three separate matters, matching the three steps entailed in the CUP application process, is not tenable. The application Z03-05 is for a single Conditional Use Permit to develop the real property into a residential community; there are not three separate applications which correspond to the three phases of obtaining a CUP: (1) LESA, (2) unresolved issues and (3) compatibility. Accordingly, a single CUP application constitutes a single "matter" under Rule 1.11, which definition includes an application pursuant to subsection (d) of the Rule, and the Circuit Court's ruling to the contrary is in error.

The Circuit Court correctly looked to the guidance of McClanahan, *supra*, for the standard for determining whether matters are substantially related:

> There are two distinct approaches to what is meant by a "substantially related matter." The first approach, which has been adopted by a majority of the courts, compares the facts, circumstances, and legal issues of the past and present representations and determines whether they are related in some

> substantial way. The other approach, adopted primarily by the Second Circuit, finds a substantial relationship present only when the issues between the two representations are identical or virtually identical. Courts have criticized this approach because issues frequently are not developed until long after litigation has been commenced. Not only is the issue-oriented inquiry more limited, it delays bringing a disqualification motion until the issues in the case are developed.
>
> We conclude that the majority rule is more sound. Consequently, under Rule 1.9(a), determining whether an attorney's current representation involves a substantially related matter [ ] to that of a former client requires an analysis of the facts, circumstances, and legal issues of the two representations.

189 W.Va. at 572-3, 430 S.E.2d at 293-4 (citations omitted). Accordingly, the Circuit Court used the majority rule standard discussed in McClanahan in its determination of whether the LESA score for and compatibility of the Thorn Hill II CUP Application Z03-05 were substantially related matters. Notwithstanding the Circuit Court's analysis of the facts, circumstances and legal issues of the two representations, the Circuit Court ignored that both LESA and compatibility are stages in a single application process.

The Circuit Court further relied upon a decision from the Court of Appeals from the District of Columbia in making its determination that the matters are not substantially related. However, a review of Brown v. District of Columbia Board of Zoning Adjustment, 486 A.2d 37 (D.C. 1984), cited by the Circuit Court reveals that the case does not support the Circuit Court's ruling but instead supports the BZA's contention that the matters are substantially related.

Brown concerned three transactions which all involved the same piece of real property: (1) litigation commenced in April 1975 challenging height limits on the property; (2) discussions in October 1975 about mixed residential and commercial uses on the property; and (3) a 1977 application for an exception to the zoning regulations for underground parking spaces. Two former government lawyers moved to private practice in 1976 after working on the height limit

litigation and discussions about mixed residential and commercial uses for the government. In private practice the former government lawyers represented the owner of the same property who then sought an exception to the zoning regulations related to underground parking for that real property. The Brown court found that the three matters were not substantially related because the application for parking spaces was not interrelated with height limits or mixed commercial and residential uses. Therefore the Brown court ruled that the former government lawyers should not be disqualified from representing the developer in regard to the parking issue. The facts in Brown stand in stark contrast to the facts presented here with Thorn Hill.

Thorn Hill filed an application for the Thorn Hill II CUP, Z03-05, while Mr. Cassell was an Assistant Prosecutor representing the BZA. In his role as a government attorney, Mr. Cassell counseled the BZA about step one of the Z03-05 CUP application: the LESA score. Moreover, according to the uncontroverted testimony of Thomas R. Trumble, vice-chairman of the BZA, Mr. Cassell was present for discussions of compatibility[6] of the Thorn Hill project.
No testimony was offered to refute Mr. Trumble's testimony regarding this matter. Rather Thorn Hill's counsel argued that Mr. Cassell was only involved in compatibility of the Thorn Hill project on behalf of Thorn Hill, not while counsel for the BZA.

Mr. Cassell and his firm concede that when he went into private practice he counseled Thorn Hill on step three of the Z03-05 application: compatibility. The matters are not arguably the same, they are identical: two portions of the same application, Z03-05. Unlike the developer in Brown, Thorn Hill did not file a separate request regarding a separate aspect of property development. Rather now that Mr. Cassell represents Thorn Hill it continues to seek the same development of 595 homes which it sought when Mr. Cassell represented the BZA. Campbell,

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[6] Q: Was Mr. Cassell privy to those discussions about the compatibility of the project?
A: Yes.
Tr.28:7-9.

Miller, Zimmerman's representation of the Respondent in this matter involves the same Conditional Use Permit application pending before the BZA when Mr. Cassell represented that body as an Assistant Prosecutor, Z03-05.

This is confirmed by the testimony of both Thorn Hill's witnesses. Expert witness, Robert H. Davis, Jr., Esq., was asked:

> Q: To be clear, Thornhill continues to seek approval of 595 lots on 541 acre subdivision they originally sought approval for in this revised conditional use permit application which was prepared in November of 2003?
> A: I'm assuming that, yes.

Tr. 20314-18. Herbert Jonkers, manager for Thorn Hill and Highland Farms was asked:

> Q: Mr. Jonkers, back in January of 2004 a revised conditional use permit application was filed with the Department of Planning and Zoning Engineering; is that correct, for the Thornhill project?
> A: Yes.
> Q: And you're still seeking approval of that conditional use permit; is that correct?
> A: That's correct."

Tr. 225: 6-13. Thus, it is clear from the testimony of Mr. Davis and Mr. Jonkers that the Thorn Hill II CUP Application seeking an increase in density to 595 homes in the rural district in Jefferson County is the same application, Z03-05, that was pending before the BZA when Mr. Cassell represented that body during the LESA phase of Z03-05 in 2004 and until his departure from the Prosecutor's Office on January 31, 2005.

Thorn Hill's counsel concedes that the same real property is at issue in the LESA appeal and compatibility assessment, but denies that LESA and compatibility are the same matter. The Circuit Court seemed to find this argument regarding the same parcel of land to be persuasive[7]

[7] The Circuit Court also inquired of the parties regarding drilling an oil well on the land and cited that hypothetical scenario in its ruling. However, the hypothetical is irrelevant, as such drilling would require a separate application for use of the land. Here, Thorn Hill filed for a single application to develop the land, Z03-05, thus any

based on its reliance on Brown. However, that reliance is unfounded. Brown centered on three ***separate*** transactions all related to the same real property, not three portions of the same transaction. In contrast, only a single application has been filed by Thorn Hill to initiate the LESA and compatibility processes for Thorn Hill II: Conditional Use Permit Application Z03-05, which has sought the same use—residential development of 595 lots on 541 acres—for the property since the application was filed[8].

Further, expert testimony offered on behalf of the BZA by Allan N. Karlin, Esq., at the November 21, 2006 hearing supported the conclusion that the Thorn Hill II LESA score and Thorn Hill II compatibility assessment are one matter as contemplated by Rule 1.11:

> . . . Thornhill has applied for a conditional use permit and is going through the stages to get that so it can build its larger development and to try and carve that out and say well, Mr. Cassell was only involved in part one of that application and therefore 1.11 doesn't apply seems to be an awful big stretch if you look at definitions of matter. Application is one of the definitions. You've got—to me, the Thornhill application is one thing. *Tr. 86:4-11.*

> The matter here is the Thornhill development which has many issues related to it. It has issues of LESA; it has issues of compatibility; it has issue—unresolved issues; it's going to have things done by Mr. [Raco]; it's going to have things appealed; it's going to have meetings—community meetings where issues are discussed; it's going to have potential appeals to the BZA, those things all happen in Thornhill's process of building a development out there which it seems to me at least in my opinion Mr. Cassell was personally and substantially involved in. *Tr. 158:9-18.*

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consideration of a completely separate use is both irrelevant and demonstrates a fundamental misunderstanding of the land use laws applicable within the county.

[8] The BZA notes that a "revised" application for Z03-05 was filed on January 5, 2004, but that the application remains essentially the same with the same use sought, and further notes that the only revision was the inclusion of additional supporting documentation for that same use.

In Walker v. State Department of Transportation and Development, 817 So.2d 57 (2002), the Supreme Court of Louisiana did not disqualify[9] a former Attorney General who went into private practice representing a plaintiff, Walker, against the Department of Transportation and Development (DOTD), although the Walker litigation was filed against DOTD while the lawyer was an Assistant Attorney General. The Court noted that the lawyer testified that "he 'had no idea that the case ever existed while [he] was an Assistant Attorney General.'" *Id.* at 61. Further the Court wrote, "[t]here is no proof in the record to the contrary. Thus there is no evidence to support a conclusion that [the lawyer] should be disqualified for representing another person in the 'same matter.'" In contrast, Mr. Cassell not only knew the Thorn Hill II Z03-05 application existed, he was at meetings where it was discussed, participated in closed sessions with his client, the BZA, about the application, drafted letters and orders regarding the application. Moreover, in Walker, the state argued that the former attorney general should be disqualified because the Walker case was "the type of suit[ ] that [the lawyer] defended as counsel for the DOTD." *Id.* The BZA does not allege that Mr. Cassell used his specialized knowledge of Conditional Use Permit applications obtained while BZA counsel in his representation of Thorn Hill, rather the BZA alleges that Mr. Cassell used his specialized knowledge of the Thorn Hill II Z03-05 CUP application to later assist Thorn Hill in its attempt to obtain the Thorn Hill II Z03-05 CUP.

As noted previously, to obtain a Conditional Use Permit under the Jefferson County Subdivision Ordinance, an applicant must obtain three approvals: (1) LESA, (2) resolution of unresolved issues and (3) compatibility. Thus, the Thorn Hill II Conditional Use Permit

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[9] The Motion to Disqualify in Walker cited Rules 1.9 and 1.11 of the Louisiana Rules of Professional conduct. Louisiana Rule 1.9 is identical to West Virginia's rule. Louisiana Rule 1.11 is identical to West Virginia's rule except as related to the exception for law clerks which included in West Virginia's rule but not in the Louisiana version in effect in 2002.

application cannot be segmented into several processes. Therefore, the Thorn Hill II CUP, including the LESA score and compatibility, is a single matter as defined by Rule 1.11 of the West Virginia Rules of Professional Conduct. Accordingly, the Circuit Court erred in ruling that the LESA score and compatibility process are not substantially related matters.

B. The Circuit Court Erred in Failing to Consider the Rationale behind Rule 1.11 of the West Virginia Rules of Professional Conduct.

The Circuit Court erred in ruling that Mr. Cassell and his firm were exempt from any of strictures of Rule 1.11, without considering the concerns that accompany the subsequent government and private employment, including negotiation for employment and notice to former clients. Several courts have considered disqualification cases where lawyers left government to enter private practice and those courts have addressed the rationale for a rule which solely addresses government lawyers' subsequent private practice, such as West Virginia Rule of Professional Conduct 1.11, and further why Rule 1.11 (or other similar ethical rules in other jurisdictions) should apply to such former government lawyers.

The Comment to Rule 1.11 explains that the rule is designed to "prevent a lawyer from exploiting public office for the advantage of a private client." Mr. Karlin's testimony affirmed that Mr. Cassell's and Campbell, Miller, Zimmerman's actions demonstrated the type of harm the rule was designed to prevent. Mr. Karlin provided his opinion about the harm involved in permitting Mr. Cassell to continue to represent Thorn Hill. "One [harm] is the potential harm to public people. There's a public perception issue that I think the Rules are designed to protect against." *Tr. 99:6-8; 99:15-17.* The Circuit Court focused on the distinction that Mr. Cassell previously represented a quasi-judicial body, the BZA, when the interests of the BZA and Thorn Hill were not necessarily adverse to one another. However, it is unlikely that lay members of the

public will draw such a fine distinction between representing a quasi-judicial body and any other government entity. The need to protect the integrity of the legal system and maintain the public perception of fairness within the system must trump any such concerns of the Circuit Court. Mr. Karlin opined, "There's a continuing harm to the profession and the integrity of the system when attorneys violate the Rules and yet continue to represent . . . . I think that's the harm that always exists when Rules are violated and not enforced and attorneys are allowed to represent people in violation of the Rule that was designed to in some cases prevent them from doing so." *Tr. 104:12-14, 105:1-5.*

In Brown, *supra*, the District of Columbia Court of Appeals expressed a number of concerns about "revolving door cases" under then-applicable Canon 9 of the ABA Code of Professional Responsibility[10], including that:

> the lure of private practice may undermine a government attorney's responsibilities to the public. In the first place, some government attorneys enjoy more latitude than private attorneys in deciding how to spend their time and their client's resources. . . . Thus, if a government attorney could anticipate changing employers to exploit his or her knowledge of a particular case for private gain—even without taking sides against the government—there is a real possibility that government counsel could channel government resources into cases primarily suited to eventual, lucrative employment, rather than into cases more clearly in the public interest. . . .
>
> [And] while not initiating a case for later private purposes, a government attorney could structure a case in a way that might leave room for later private employment. . . . Finally, in dealing with regulations or agency policies, a government attorney could neglect his or her duties in a way that later could inure to the benefit of a private employer in a case related to that neglect. . . .

[10] The ethical rule considered by the Brown court was the then-effective Code of Professional Responsibility DR9-101(B) which provided "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." This version of the Code was effective in 1978 when the Brown petitioners moved to disqualify counsel and was later modified in 1982 to provide, "[a] lawyer shall not at any time accept private employment in connection with any matter in which he or she participated personally and substantially as a public officer or employee. . ." Both versions of the canon while not identical to, address essentially the same issues as West Virginia Rule of Professional Conduct 1.11.

> [A] fourth concern is that an attorney may at times choose to be over-zealous or under-zealous in representing the interests of the government client in the hope of "currying favor" with private sector employers and later being rewarded with private employment on unrelated matters.
>
> Fifth, while in government, an attorney may develop a reputation by initiating or promoting policies that are calculated to advance that attorney's marketability in the private sector without regard to any particular kind of case.
>
> Sixth, after leaving the government, an attorney may make use of expertise—special knowledge of agency policies, practices, and procedures acquired while on the government payroll—to the advantage of private clients.
>
> Seventh, after leaving the government, an attorney may make use of government contacts (old friends) to gain special advantage for private clients.

486 A.2d at 45-46.

In Iowa Supreme Court Attorney Disciplinary Board v. Howe, 706 N.W.2d 360 (2005), the Supreme Court of Iowa also discussed disqualification of a lawyer in relation to DR 9-101(B)[11], and cites to a treatise on ethics:

> [T]he rationale for disqualification is rooted in a concern with the impact that any other rule would have upon the decisions and actions taken by the government lawyer during the course of the earlier representation of the government. Both courts and commentators have expressed the fear that permitting a lawyer to take action in behalf of a government client that later could be to the advantage of a private practice client would present grave dangers that a government lawyer's largely discretionary actions would be wrongly influenced by the temptation to secure private practice employment or to favor parties who might later become private practice clients. . . .

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[11] In Footnote 6 of the Howe decision the Iowa Supreme Court states that, "[t]his concept [under DR9-101(B)] is also found in our new rules. See Iowa R. of Prof'l Conduct 32:1.11(a)(2)(prohibiting lawyer who formerly served as government employee from representing 'a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee' unless the government consents." The concept of DR9-101(B) and Rule 32:1.11(a)(2) seems to be similar in the former rule, and identical in the latter, to West Virginia's Rule 1.11(a)(2).

> The fear that government lawyers will misuse government power in that way is not idle. Lawyers who represent the government often exercise enormous discretion unchecked by an actual client who oversees the lawyer's work. For that reason a special rule is needed to remove the incentive for government lawyers to take advantage of discretionary decisions with an eye cast toward advantages in future, nongovernmental employment.
>
> Modern Legal Ethics § 8.10.1, at 458.

706 N.W.2d at 374.

In Commonwealth v. Eastern Dawn Mobile Home Park, Inc. 486 Pa. 326, 405 A.2d 1232 (1979), the Supreme Court of Pennsylvania disqualified a former prosecutor "even though "we find no actual improper conduct on the part of either" the new employer or the former prosecutor. *Id.* at 332, 1235. There a former prosecutor, Lampi, "investigated complaints against a mobile home park, effectuated a compromise, and issued a formal report finding the park did not violate" the law was disqualified after going into private practice with the lawyer representing the mobile home park which Lampi had investigated. *Discussed in* City of Philadelphia v. District Council 33, *et al.*, 503 Pa. 498, 469 A.2d 1051 (1983). The Court in City of Philadelphia stated, "[w]e applied the disqualification to the attorney's entire firm, holding that where an attorney was barred by ethical considerations from representing a particular client, all attorneys in the same firm would be similarly barred." *Id.* at 503, 1053. The Eastern Dawn court explained its rational for disqualification of the firm thusly, "[a]t a time when public confidence in the legal profession is seriously eroded, however, the [firm] must be disqualified because of the Appearance of impropriety." 486 Pa. at 332-3, 405 A.2d at 1235.

The rationales for disqualification considered by the District of Columbia Court of Appeals, Iowa Supreme Court and Supreme Court of Pennsylvania are well considered and should be applied here. Both the appearance of impropriety and the potential to misuse

government power are present in this case. On December 17, 2004, seven days after submitting his letter of resignation but while still an Assistant Prosecutor representing the BZA, Mr. Cassell directed the Zoning Administrator Mr. Raco in writing to act consistently with a request received from Mr. Campbell on the previous day. Forty-six days after directing Mr. Raco to act consistently with Mr. Campbell's request, on February 1, 2005, Mr. Cassell became a member of the firm of Campbell, Miller Zimmerman, representing Thorn Hill on the Z03-05 CUP application. Mr. Cassell's change of sides in the Thorn Hill II CUP application, coupled with his directive to Mr. Raco which occurred after Mr. Cassell's resignation, but before the resignation became effective, could be viewed as a government attorney exploiting his knowledge of a particular case for private gain, which was one of the concerns of the Brown court. Moreover, under a Howe analysis, Mr. Cassell's actions on behalf of his government client which might later have benefited his private practice client, Thorn Hill, could suggest that as a government lawyer Mr. Cassell's largely discretionary actions were misapplied. Further, neither the Campbell firm nor Mr. Cassell provided notice of his change in representation, written or otherwise, to the BZA as required by 1.11(a). Therefore, Mr. Cassell's previous client did not have the opportunity required in the rule to determine whether his firm complied with the provisions of the rule and whether the firm screened Mr. Cassell from all participation.

Mr. Karlin's testimony confirmed that Campbell, Miller, Zimmerman should have screened Mr. Cassell from involvement in the Thorn Hill matter:

> What caused me even more concern is when Mr. Thompson wrote Mr. Cassell . . . earlier this year and pointed out what he perceived to be a problem with Mr. Cassell's involvement in the litigation surrounding the earlier Thornhill case. It would have seemed to me that that would have put Mr. Cassell and Mr. Campbell on notice that they had a 1.11 problem with the larger Thornhill matter and I would have thought at that point they would have either sought an opinion from the lawyer disciplinary board. . . or

> they would have immediately taken steps to screen Mr. Cassell out of the case, [and] provide notice to the BZA. . . *Tr. 93:16-24, 94:4-5.*
>
> Yet here we are today, much later, they haven't done that yet and now they're suddenly willing to screen. It's awfully late in the game and it seems to me once you let the cat out of the bag you really can't put it in. These rules are designed to be the rules that we as lawyers follow and they haven't followed them. It's a little late to try and fix it on just the simple 1.11 without even getting into the confidentiality issue. *Tr. 94:8-15.*

This failure to provide notice and screen merits disqualification not only Mr. Cassell but the entire Campbell, Miller, Zimmerman firm.

In this instance, where the firm completely ignored the strictures of Rule 1.11, there is the public perception of impropriety. As an Assistant Prosecutor Mr. Cassell was hired to represent a public body created to administer the County's Ordinances and land use policies, and as such he was entrusted to give advice in the best interest of his client and the public. However, if Mr. Cassell was negotiating with a firm for private employment while that firm was representing Thorn Hill in CUP Application Z03-05 which was pending before the BZA, while Mr. Cassell represented the BZA, there is a legitimate concern that any advice he rendered to that body on the application might have been intended to curry favor with his future, non-governmental employer, Campbell, Miller, Zimmerman, or intended to benefit his future client, Thorn Hill. Further, when Mr. Cassell accepted employment with Campbell, Miller, Zimmerman the possibility exists that Mr. Cassell interpreted the LESA and Zoning requirements in such a way as to benefit his future client, Thorn Hill prior to his actual representation of that client. Thus, there is a blemish, real or imagined, on the advice contained not only in the December 17, 2004 letter from Mr. Cassell to Mr. Raco but on any advice that Mr. Cassell provided to the BZA on the Thorn Hill II CUP when he may have been negotiating for private employment. Even if his

advice was consistent with the County's interests, the appearance of impropriety still exists and thus the concerns enumerated by both the District of Columbia and Iowa Courts are present.

The BZA's expert Mr. Karlin also expressed these concerns in his unequivocal opinion that Mr. Cassell's role was a violation of Rule 1.11 regardless of the BZA's decision on the Thorn Hill II CUP. Mr. Karlin testified that:

> The issue of the BZA decision on Thornhill, whichever way it goes, not being tainted by the fact that Mr. Cassell who has been counsel to the BZA on Thornhill matters is representing Thornhill. That to the public, I think, is the kind of thing that this Rule was designed to prevent in a very clear way. . . . That is the kind of blemish on the process and on our profession that 1.11 was designed to prevent.

Tr. 139:3-8, 19-21.

It is clear that the concerns that form the rationale for Rule 1.11 are all present in this case where Mr. Cassell represented the BZA and subsequently Thorn Hill on the same CUP application. Nonetheless, the Circuit Court after erroneously concluding that the LESA appeal and compatibility assessment were not the same matter, failed to consider the reasons for a specific rule addressing ethical issues unique to government attorneys.

C. The Circuit Court Erred in Ruling that as a Public Body the Board of Zoning Appeals Does Not Have a Traditional Attorney-Client Privilege with its Counsel.

The Circuit Court erroneously found that, "to presume confidences [between the BZA and its counsel] does not seem to comport with representing a public body." *Order Denying Defendant's Motion to Disqualify*, at 12-13. The Circuit Court's ruling suggests that a public body cannot conduct any confidential business with its attorney, and that a public body does not have a traditional attorney-client privilege with its counsel. However, West Virginia case law makes clear that public bodies do have a traditional attorney-client privilege with their counsel,

including the right to closed sessions to confer with such counsel. *Syllabus Points 5* and *6* of Peters v. County Commission of Wood County, 205 W.Va. 481, 519 S.E.2d 179 (1999)[12] both reference the privileged communications between a public body and its attorney[13], and Syllabus Point 6 specifically references the attorney-client privilege possessed by a public body.

As to the more general topic of the attorney-client privilege itself, this court has long recognized the importance of maintaining the attorney-client privilege. *Syllabus Point 2* of State v. Douglass, 20 W.Va. 770 (1882), provides in pertinent part that, "The entire professional intercourse between an attorney and his client, whatever it may have consisted in, should be protected by profound secrecy. . . ." More recently, this Court wrote that, "[f]rom the client's perspective, a lawyer owes a duty of loyalty to his/her client. 'Loyalty is an essential element in the lawyer's relationship to a client.'" Lawyer Disciplinary Board v. Artimez, 208 W.Va. 288, 299, 540 S.E.2d 156 (2000), *Quoting* W. Va. Rules of Professional Conduct, Rule 1.7 cmt. Loyalty to a Client. The Artimez court further expounded, "[i]n essence, an attorney is a repository of the client's confidences, and the trust a client places in his/her lawyer is so highly esteemed, and deemed so integral to a successful attorney-client relationship, that it has been

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[12] Syllabus Point 5 provides: "Privileged communications between a public body subject to the requirements of the Open Governmental Proceedings Act, West Virginia Code § § 6-9A-1 to -7 (1993 and Supp.1998), and its attorney are exempted from the open meetings requirement of the Act. Such executive session may be closed to the public only when the following statutory requirements are met: 1) a majority affirmative vote of the members present of the governing body of the public body, as required by West Virginia Code § 6-9A-4; 2) the notice requirements as found in West Virginia Code § 6-9A-3 shall be followed; and, 3) the written minutes requirements as found in West Virginia Code § 6-9A-5 shall be followed. However, a public agency is not permitted to close a meeting that otherwise would be open merely because an agency attorney is present."

Syllabus Point 6 provides: "When a public body closes an open meeting on the basis that the matters to be discussed in that meeting are exempt from the Act as a result of the attorney-client privilege and that claim is challenged, the circuit court should review in camera whether the communications do indeed fall within that privilege. In other words, a bare claim that the matters to be discussed in a meeting of a public body are privileged, if challenged, does not suffice to close the meeting."

[13] Peters is concerned with the Open Governmental Proceedings Act—presumably such sunshine law concerns were behind the Circuit Court's erroneous ruling.

afforded a status of privilege." 208 W.Va. at 300. Mr. Cassell clearly was in an attorney-client privileged relationship with the Board of Zoning Appeals, as demonstrated by his representation of that body in various litigation, including the Thorn Hill II Z03-05 LESA appeal, and in his presence during the BZA's deliberative sessions regarding that appeal. Through his representation of the BZA in the Thorn Hill II LESA litigation Mr. Cassell clearly participated personally and substantially in the litigation. Additionally, through his presence in and counsel offered during the BZA's deliberative sessions on the compatibility of Thorn Hill II, Mr. Cassell also participated personally and substantially on behalf of the BZA regarding the compatibility component of the Thorn Hill II Z03-05 CUP application. As noted earlier, the compatibility component of Z03-05 is not arguably a "substantially related" matter to Thorn Hill's compatibility; the "matter" on which Mr. Cassell now represents Thorn Hill is the exact same matter.

This Court has previously disqualified attorneys with imputed, not actual, knowledge of a confidential communication. In State *ex rel.* Cosenza v. Hill, 216 W.Va. 482, 607 S.E.2d 811 (2004), the defendant Bucklew was initially represented by the firm of Steptoe & Johnson which employed Mr. Wolf as an associate attorney, although Wolf did not work on defendant Bucklew's case. Wolf later left Steptoe & Johnson and worked for the Cosenza firm which represented the plaintiff Jacobs, and Wolf himself assisted with the plaintiff Jacobs' case. The Court held that Wolf and the entire Cosenza firm were disqualified from representing Jacobs even though Wolf never worked on Bucklew's case while at Steptoe & Johnson. The Court was "inclined to find that such knowledge [of the Bucklew representation] may properly be imputed to Wolf based upon the fact that the matter in which his former law firm represented Bucklew is the exact same lawsuit in which Wolf now seeks to represent Bucklew's opponents." 216 W.Va.

at 487. The Court found "knowledge of such [attorney-client] confidences to be imputed to Wolf pursuant to Syllabus point 4 of State *ex rel.* McClanahan v. Hamilton [ ][*supra*]. Consequently, we further find, pursuant to Rule 1.10(b)[14] that attorneys Wolf and Cosenza, as well as the entire Cosenza law firm, are disqualified from their representation of the Jacobs in their litigation against Bucklew." 216 W.Va. at 488.

Syllabus Point 2 of Cosenza provides, "[o]nce a former client establishes that the attorney is representing another party in a substantially related matter, the former client need not demonstrate that he divulged confidential information to the attorney as this will be presumed." Accordingly, pursuant to *Syllabus Point 2* of Cosenza the BZA need not demonstrate that it divulged confidential information to Mr. Cassell when he was counsel to the BZA, as that will be presumed. Nonetheless, testimony from Thomas R. Trumble, then vice-chairman[15] of the BZA indicated that Mr. Cassell was counsel for the BZA and that the Board entered into communications with Mr. Cassell which Mr. Trumble considered confidential.[16] Moreover, Mr. Trumble also testified that the BZA entered a closed session regarding the Thorn Hill II CUP application and that Mr. Cassell was present during that deliberative session[17].

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[14] Rule 1.10, entitled "Imputed Disqualification" requires adversity of interests between the prior and current representations to merit disqualification. Mr. Cassell and his firm argue that Thorn Hill was not previously adverse to the BZA but merely a litigant before that body, however, in the case *sub judice* Thorn Hill has sued the BZA, which suggests sufficient adversity of interest as to meet the Rule 1.10 standard.

[15] Since the November 21, 2006 evidentiary hearing Mr. Trumble has become the Chairman of the BZA.

[16]
Q: When you were a member of the BZA starting in 2003 were you represented by counsel?
A: Yes.
Q: Who was that counsel?
A: Mike Cassell. . . .
Q: In your view were the conversations you had with Mr. Cassell confidential?
A: They were treated as confidential. When we go into closed session each of us understands and indeed are occasionally reminded that these discussions are to be held closely and are not to be discussed with people outside the board. November 21, 2006 Evidentiary Hearing Transcript, *Tr. 25:17-21 Tr. 31: 11–16*

[17]
A: After we've heard the evidence in sort of a proceeding, we then go into a closed session to debate the issues, discuss the issues and come up with a conclusion.
Q: Did you do that in Thornhill?

However, despite such testimony, the Circuit Court found that, "to presume confidences does not seem to comport with representing a public body." *Order Denying Defendant's Motion to Disqualify*, at 12-13. This court in Peters, *supra*, clearly contemplated that public bodies and their attorneys do possess confidences, as that decision discusses the attorney-client privilege of public bodies and executive sessions for those public bodies to confer with counsel. Mr. Trumble testified as to the privileged attorney-client relationship between Mr. Cassell and the BZA, and further that he placed a very high value on the legal advice received from Mr. Cassell, and that he was strongly influenced by such advice[18].

The Circuit Court stated in its ruling that, "this Court finds that the Supreme Court would not apply the strict Cosenza standard to government attorneys, especially one who represented a public body. . ." Such a ruling implies that government attorneys should have a more lenient standard of conduct, but as discussed above, more often courts and commentators have held government attorneys to a higher standard of conduct, as evidenced by the need for a special rule, Rule 1.11 titled "Successive Government and Private Employment".

Additionally, Allan N. Karlin, Esq., testified as an expert witness on behalf of the BZA that when Mr. Cassell was employed as an Assistant Prosecutor, his involvement with Thorn Hill was the type of personal involvement contemplated by Rule 1.11:

> It seemed really clear to me both from the testimony of Mr. Trumble . . . most of which I was aware of before this morning, as well as the interrelationship . . . between the various Thornhill projects that

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A: We certainly did.
Q: Was Mr. Cassell present during this?
A: Yes, he was." *Tr. 27:1-7.*

18 A: . . . . I certainly depended upon Mr. Cassell's legal representation. We had some very strong opinions on our Board and my feeling was Mr. Cassell represented my final interpretation of what the law was and how I should factor that in my vote." *Tr. 42:1-5.*
A: . . . . [M]y vote in my perspective was one that had to be in fact in accordance with the law as our appointed lawyer [Mr. Cassell] understood it and told it to me. *Tr. 46:3-6.*

> appeared before the BZA when Mr. Cassell was its attorney. You put all of that together it's clear that Mr. Cassell was personally involved in Thornhill while he was counsel for the BZA and it's clear to me at least that he was also substantially involved in the Thornhill project when he was at the BZA. When I say personally, it's clear, he was in meetings, he gave advice, he wrote findings of fact, he personally was involved in Thornhill so I don't think there's much room to discuss the issue.

Tr. 82:10-24; 83:1. Mr. Karlin also testified as to the factors that lead him to determine that Mr. Cassell was involved in Thornhill in a significant way:

> First of all, he was in deliberative meetings at least on the larger Thornhill submission." *Tr. 83:14-15.*

> He wrote the findings of fact on the Thornhill applications. Granted, he was doing what the Board decided, but he still had to turn it into a final product. He, according to Mr. Trumble, gave advice. I know Mr. Trumble couldn't remember specific things, but typically gave advice as to how to interpret on Thornhill. We're not talking about general interpretations, but in the context of talking about Thornhill if you look at the records there were occasions where he directed staff to do things for Thornhill.
> *Tr. 84:4-13.*

> Mr. Cassell was very much involved. Everyone agrees in the original Thornhill project which is now part of the larger Thornhill Project which is pending before the BZA. I think it would be a stretch not to conclude that he was personally and substantially involved in Thornhill. *Tr. 85:6-11.*

The testimony of both Mr. Karlin and Mr. Trumble supports the contention that Mr. Cassell, while a public officer or employee, personally and substantially participated in the consideration of the Thorn Hill II CUP application.

Mr. Trumble, the Vice-Chairman of the BZA, testified that he believed the conversations with the BZA's counsel, Mr. Cassell, were privileged. Mr. Karlin testified that his opinion was that the BZA had a privileged attorney-client relationship with Mr. Cassell. Mr. Cassell, through representations of Mr. Campbell, conceded that he was in an attorney-client relationship with the

BZA, but contended his privileged relationship with the BZA was regarding the Thorn Hill II CUP was contained to the sole topic of the LESA score. The uncontroverted testimony on the topic was from Mr. Trumble. The Circuit Court recognized that Mr. Cassell was counsel for the BZA but found that "[a]lthough Mr. Cassell may have been substantially involved with Thornhill the party, this does not mean he was substantially involved with the same matter." *Order Denying Defendant's Motion to Disqualify*, at 20.

The Circuit Court erred in its rulings regarding the attorney-client privilege Mr. Cassell had with the BZA. Either the Circuit Court misread the ruling of Peters or failed to take judicial notice of its holdings regarding the attorney-client privilege possessed by public bodies. The BZA was entitled to the same shared confidences with its counsel to which private clients are entitled.

Moreover, the Circuit Court also erred in its assertion that the Supreme Court would not apply the strict Cosenza standard to government attorneys. Cosenza supports disqualification of Mr. Cassell and his firm, as the facts there are **less** egregious than those presented here. In Cosenza Mr. Wolf, the attorney whose move between firms prompted the motion to disqualify, did not work on the Jacobs/Bucklew litigation while at his former firm, but merely worked in close proximity to those attorneys who did litigate the case. Nonetheless, such close proximity was found by the court to impute to him knowledge of the case, and thereby disqualified not only him but his new firm. In contrast, prior to joining Campbell, Miller, Zimmerman, Mr. Cassell was the **sole attorney** for the Board of Zoning Appeals and actually represented that body in litigation involving the Thorn Hill II CUP application. Mr. Cassell and his firm now represent Thorn Hill against the BZA in regard to the Thorn Hill II CUP application. The taint is substantially greater here where Mr. Cassell was the attorney who previously represented the

BZA than in Cosenza where Mr. Wolf's office was close to other lawyers who worked on the Jacobs/Bucklew case. Accordingly, pursuant to Cosenza, Mr. Cassell and Campbell, Miller, Zimmerman should be disqualified from such representation because "the conflict is such as clearly to call in question the fair or efficient administration of justice." *Syllabus Point 4*, Cosenza, *supra*.

D. The Circuit Court Erred in Ruling that Mr. Cassell Did Not Violate Rule 1.11(c) in Negotiations for Employment on the Basis that the Two Matters are Not Substantially Related.

The Circuit Court erroneously ruled that Mr. Cassell did not violate Rule 1.11(c) of the West Virginia Rules of Professional Conduct in his negotiations for employment "because the two matters are not substantially related." *Order Denying Defendant's Motion to Disqualify* at 23. However, that standard is a fundamental misreading of the requirements of the Rule. Rule 1.11(c)(2) of the West Virginia Rules of Professional Conduct provides that:

> Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not . . . negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially. . .

The rule does not require an analysis of two representations, as does Rule 1.11(a), rather, the rule is more succinct in its mandate that a government lawyer shall not negotiate for private employment with "any person who is involved as a party ***or as attorney for a party*** in a matter in which the lawyer is participating personally and substantially." (Emphasis added.) Mr. Cassell and his firm concede that he participated personally and substantially as counsel for the BZA in regard to the Thorn Hill II LESA score litigation. On December 10, 2004, Mr. Cassell submitted his resignation. One week later, on December 17, 2004 Mr. Cassell wrote to the Zoning

Administrator, Mr. Raco, and directed Mr. Raco to take action on the Thorn Hill II LESA score matter. Six and one half weeks later Mr. Cassell became a principal in Campbell, Miller, Zimmerman, which firm was representing Thorn Hill in the LESA litigation about which Mr. Cassell had written to Mr. Raco on December 17, 2004.

The Circuit Court initiated this discussion of Mr. Cassell's negotiations during the November 21, 2006 evidentiary hearing. Although the BZA did not address the topic of whether Mr. Cassell did negotiate for private employment with Campbell, Miller, Zimmerman while representing the BZA, if such negotiation did occur, the only appropriate remedy is disqualification of Mr. Cassell and his firm. More critically, the Circuit Court's evaluation of why Mr. Cassell and his firm should not be disqualified from representing Thorn Hill was based upon criteria not contained in Rule 1.11(c), and accordingly such analysis was in error.

REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, the Petitioner requests that this Court issue a rule to show cause why a writ should not be granted prohibiting the Circuit Court from entering an order which denies the Board of Zoning Appeals' Motion to Disqualify.

Respectfully submitted,
JEFFERSON COUNTY
BOARD OF ZONING APPEALS

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

JEFFERSON COUNTY
BOARD OF ZONING APPEALS,
Petitioner,

v.

Appeal No. _____
(Jefferson County Circuit Court
Case Number 06-C-195)

HONORABLE CHRISTOPHER C. WILKES,
JUDGE OF THE TWENTY THIRD JUDICIAL CIRCUIT,
HIGHLAND FARM, LLC, AND THORN HILL, LLC,
Respondents.

CERTIFICATE OF SERVICE

I, Stephanie F. Grove, Assistant Prosecuting Attorney for Jefferson County, West Virginia and counsel for the Petitioner do hereby certify that on this 4th day of June, 2007, I have placed a true copy of the foregoing, "Petition for Writ of Prohibition" in the United States Mail to:

J. Michael Cassell, Esq.
Campbell, Miller, Zimmerman
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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

JEFFERSON COUNTY
BOARD OF ZONING APPEALS,
Petitioner,

v.

Appeal No. _____
(Jefferson County Circuit Court
Case Number 06-C-195)

HONORABLE CHRISTOPHER C. WILKES,
JUDGE OF THE TWENTY THIRD JUDICIAL CIRCUIT,
HIGHLAND FARM, LLC, AND THORN HILL, LLC,
Respondents.

MEMORANDUM OF PERSONS TO BE SERVED

The following are the names and addresses of those persons upon whom the rule to show cause is to be served, if granted:

Respondent:

Honorable Christopher C. Wilkes
Circuit Judge, 23rd Judicial Circuit
Berkeley County Courthouse
380 West South Street, Suite 4400
Martinsburg, West Virginia 25401

For the Petitioner:

Brandon C. H. Sims
Assistant Prosecuting Attorney
Post Office Box 729
Charles Town, West Virginia 25414

For Highland Farm, LLC and Thorn Hill, LLC:

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Respondents.

VERIFICATION

I, the undersigned, hereby state that the facts alleged in the foregoing petition are true to the best of my knowledge, or if upon information and belief, are believed to be true.

Thomas R. Trumble

THOMAS R. TRUMBLE, President
Jefferson County Board of Zoning Appeals

Taken, sworn and subscribed to, before me, this 1 day of June, 2007.

Teresa E. Tritelli

NOTARY PUBLIC

My commission expires May 25, 2016

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Teresa E. Tritelli
Jefferson County Prosecuting Attorneys Office
P.O. BOX 729
Charles Town, WV 25414
My Commission Expires May 25, 2016